Duis Akim & Ors v Public Prosecutor

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–14–01 OF 2012(S)
RAUS SHARIF PCA, ZULKEFLI CJ (MALAYA), RICHARD MALANJUM CJ (SABAH AND SARAWAK), ABDULL HAMID EMBONG AND JEFFERY TAN FCJJ
18 OCTOBER 2013

Evidence — Identification evidence — Quality of identification evidence — Whether trial judge's finding of doubt in identification of accused as deceased's killers at end of trial contradicted his finding at end of prosecution case — Whether judge's ruling at end of trial erroneous — Whether identification evidence of good quality and satisfied Turnbull guidelines — Whether positive identification of accused demolished their alibi defence — Whether alibi defence in any event unacceptable

The appellants in the instant appeal were acquitted and discharged by the High Court of a charge of murdering a 23-year-old man ('the deceased') but that decision was reversed by the Court of Appeal which convicted the trio of the offence and sentenced them to death. Although the High Court found at the end of the prosecution case that the appellants had been positively identified as the assailants of the deceased and they were called upon to enter their defence, the court ruled at the end of the trial that there was doubt in the identification of the appellants as, inter alia, the photo-fits based on the descriptions given by the sole eye-witness in the case, PW 1, did not resemble the appellants at all. The Court also held the first and second appellants had established their defence of alibi; that the prosecution failed to adduce forensic evidence to link the appellants to the murder or to show they had common intention to commit the crime. The court of Appeal, in reversing the High Court's decision, held that the alibi defence went against the weight of the evidence and was unsustainable and that the trial judge's holding on the issue of identification evidence at the end of the trial contradicted his finding at the end of the prosecution case. PW1 had testified that he had a 'good five-minute look' at the appellants' faces when they entered the 7-Eleven store armed with parangs in the wee hours one morning and demanded for the money in the cash register. He said one of the appellants attacked the deceased at the storeroom area first before they set upon him. The deceased died of multiple stab wounds to the neck and upper back. PW1 identified the appellants in a police identification parade after they were arrested about a month later. The murder weapon was not recovered and forensic evidence taken from the scene was inconclusive to implicate the appellants. Whilst they did not deny that they had visited the store on the night of the murder, the first and second appellants claimed they

were already home when the murder took place. The third appellant, whilst not relying on alibi, denied he had anything to do with the murder. The appellants sought in the instant appeal to have the decision of the High Court reinstated.

Held, dismissing the appeal:

(1) The trial judge ruled at the end of the prosecution case that PW1 had positively identified the appellants as the ones who were in the store at the time of the murder. The judge must have been satisfied with the accuracy and quality of the identification relying on the fact PW1 had had a good five-minute look at the faces of the appellants that morning. But despite that finding of positive identification the trial judge erroneously reversed his initial finding at the end of the whole case; and he did it even though the defence had not adduced any evidence to rebut the positive finding on their identification (see paras 44–46 & 49).

(2) The other factors which contributed to the good quality of the identification of the appellants were: that the persons who entered the store at the material time were unmasked; the lighting in the store was bright; the persons who pointed parangs at PW1 must have been very near him; PW1's view was not hindered or obstructed; it was not a fleeting glance which PW1 had; his positive identification of the appellants remained unshaken under intensive cross-examination; PW1 had no reason or motive to implicate the appellants and the identification parade was held within a month after the incident (see para 50).

(3) The trial judge gave too much weight to the apparent inconsistent descriptions in the photo-fits of the appellants. The judge had the photo-fits before him at the end of the prosecution case; yet he called for the defence. He did not at that time find that the photo-fits contradicted the positive identification of the appellants by PW1. Considering the evidence adduced on the identification of the appellants in the light of the *Turnbull* guidelines, the court was satisfied beyond reasonable doubt that the appellants had been positively identified as the persons involved in the killing of the deceased (see paras 62–63 & 79).

(4) With the trial judge's finding that the appellants had been positively identified by PW1, the alibi defence of the first and second appellants collapsed. And as the third appellant did not rely on alibi but simply denied committing the offence, his denial collapsed as well. Alibi defence could not prevail over the positive identification of an accused person especially in the face of categorical statements coming from credible witnesses who had no ill motives in testifying (see paras 82 & 84–85).

(5) In deciding that the alibi defence had been established based on the testimonies of the appellants and of PW16, PW17, PW18, DW2 and DW3, the trial judge did not state his reasons for believing their

testimonies. He accepted their versions wholesale without reservation and did not consider that those witnesses were with the appellants that fateful night and that DW2 was the first appellant's sister. The accounts of those witnesses were contradictory in crucial and material particulars especially on the time factor which was the core of the alibi defence. Each of them gave a disparity in time of arrival home that night. None of them appeared to know, or told the truth, of their arrival time that night. It was also not disputed that the appellants and four others went to the vicinity of the store on the night of the murder. They claimed they were there before the murder took place and that at the time of the murder they were already home. It was therefore mainly a question of time and not that the appellants were never in the vicinity of the store (see paras 91, 93–94 & 96–98).

(6) On analysing the defence and the evidence as a whole the court found that the defence had not cast a reasonable doubt on the prosecution case. The prosecution had proved its case beyond reasonable doubt (see para 109).

[Bahasa Malaysia summary

Perayu-perayu dalam rayuan ini telah dibebas dan dilepaskan oleh Mahkamah Tinggi terhadap pertuduhan membunuh seorang lelaki berumur 23 tahun ('si mati') tetapi keputusan tersebut telah diakas oleh Mahkamah Rayuan yang mensabitkan ketiga-tiga mereka dan menjatuhkan hukuman mati. Walaupun Mahkamah Tinggi mendapati di akhir kes pendakwaan bahawa perayu-perayu telah pun dikenal pasti sebagai penyerang-penyerang si mati dan mereka telah dipanggil untuk memasuki pembelaan mereka, mahkamah memutuskan di akhir perbicaraan bahawa terdapat keraguan dalam pengenalan perayu-perayu kerana, antara lain, penyuaian gambar berdasarkan deskripsi yang diberikan oleh satu-satunya saksi dalam kes itu, PW1, tidak langsung menyerupai perayu-perayu. Mahkamah juga memutuskan perayu-perayu pertama dan kedua telah membuktikan pembelaan alibi mereka; bahawa pendakwaan telah gagal mengemukakan keterangan forensik untuk mengaitkan perayu-perayu kepada pembunuhan atau menunjukkan mereka mempunyai niat bersama untuk melakukan jenayah. Mahkamah Rayuan, dalam mengakas keputusan Mahkamah Tinggi, memutuskan bahawa pembelaan alibi bertentangan dengan beban keterangan dan tidak boleh dikekalkan dan bahawa keputusan hakim perbicaraan berhubung isu keterangan pengenalan di akhir perbicaraan bertentangan dengan penemuan beliau di akhir kes pendakwaan. PW1 memberi keterangan bahawa dia melihat muka-muka perayu-perayu selama 'good five-minute look' apabila mereka memasuki kedai 7-Eleven dengan bersenjatakan parang di waktu dinihari suatu hari dan mendesak untuk wang dalam mesin wang tunai. Dia mengatakan salah seorang daripada perayu-perayu telah menyerang si mati di kawasan bilik stor dahulu sebelum mereka menyerangnya. Si mati telah meninggal dunia akibat pelbagai

kecederaan tikaman di leher dan bahagian atas belakang. PW1 mengenal pasti perayu-perayu di barisan pengecaman polis selepas mereka ditangkap sebulan kemudian. Senjata pembunuhan tidak ditemui dan keterangan forensik yang diambil di tempat kejadian tidak meyakinkan untuk mengaitkan perayu-perayu. Walaupun mereka tidak menafikan bahawa mereka telah ke kedai itu pada malam pembunuhan itu, perayu-perayu pertama dan kedua mendakwa mereka telah berada di rumah apabila pembunuhan itu berlaku. Perayu ketiga, walaupun tidak bergantung kepada alibi, menafikan yang dia mempunyai apa-apa kaitan dengan pembunuhan itu. Perayu-perayu memohon dalam kes rayuan ini agar keputusan Mahkamah Tinggi dikekalkan.

Diputuskan, menolak rayuan:

(1) Hakim perbicaraan memutuskan di akhir kes pendakwaan bahawa PW1 secara positif telah mengecam perayu-perayu sebagai mereka yang berada di stor itu pada masa pembunuhan. Hakim hendaklah berpuas hati dengan ketepatan dan kualiti pengecaman berdasarkan fakta PW1 yang dapat melihat dengan baik selama lima minit muka-muka perayu-perayu pada pagi itu. Namun begitu dengan penemuan pengecaman positif itu hakim perbicaraan terkhilaf mengakaskan penemuan awalnya di akhir keseluruhan kes; dan beliau berbuat demikian meskipun pembelaan tidak mengemukakan apa-apa keterangan untuk mematahkan penemuan positif berhubung pengecaman mereka (lihat perenggan 44–46 & 49).

(2) Faktor-faktor lain yang menyumbang kepada kualiti baik pengecaman perayu-perayu adalah: bahawa mereka yang memasuki stor itu pada masa matan tidak bertopeng; pencahayaan dalam stor itu terang; mereka yang mengacukan parang-parang itu pada PW1 semestinya dekat dengannya; pandangan PW1 tidak dihalang atau dilindungi; ia bukan pandangan sekilas lalu yang dilihat oleh PW1; pengecaman positifnya terhadap perayu-perayu tidak goyah dalam pemeriksaan balas intensif; PW1 tiada sebab atau motif untuk mengaitkan perayu-perayu dan barisan pengecaman diputuskan dalam tempoh sebulan selepas kejadian itu (lihat perenggan 50).

(3) Hakim perbicaraan terlebih memberi beban kepada gambaran tidak konsisten yang jelas dalam penyuaian gambar perayu-perayu. Hakim mempunyai penyuaian gambar itu di hadapan beliau di akhir kes pendakwaan; namun begitu beliau memanggil untuk pembelaan. Beliau pada masa itu tidak mendapati penyuaian gambar itu bertentangan dengan pengecaman positif perayu-perayu oleh PW1. Berdasarkan keterangan yang dikemukakan atas pengecaman perayu-perayu berasaskan garis panduan kes *Turnbull*, mahkamah berpuas hati melampaui keraguan munasabah bahawa perayu-perayu telah dikenal

pasti dengan positif sebagai orang-orang yang terlibat dalam pembunuhan si mati (lihat perenggan 62–63 & 79).

(4) Dengan penemuan hakim perbicaraan bahawa perayu-perayu telah dikenal pasti secara positif oleh PW1, pembelaan alibi perayu-perayu pertama dan kedua dengan itu gagal. Dan oleh kerana perayu ketiga tidak bergantung kepada alibi tetapi dengan hanya menafikan melakukan kesalahan itu, penafiannyanya juga gagal. Pembelaan alibi tidak boleh kekal mengatasi pengecaman positif orang yang dituduh terutamanya berdasarkan kenyataan kategori tentang muka yang dibuat oleh saksi yang boleh dipercayai yang tiada motif tidak baik dalam memberi keterangan (lihat perenggan 82 & 84–85).

(5) Dalam memutuskan bahawa pembelaan alibi telah dibuktikan berdasarkan keterangan-keterangan perayu-perayu dan PW16, PW17, PW18, DW2 dan DW3, hakim perbicaraan tidak menyatakan sebab-sebab beliau kerana mempercayai keterangan-keterangan mereka. Beliau menerima sepenuhnya versi-versi mereka tanpa rasa ragu dan tidak mengambil kira bahawa saksi-saksi tersebut bersama perayu-perayu pada malam kejadian dan bahawa DW2 adalah adik perempuan perayu pertama. Keterangan saksi-saksi tersebut bertentangan dengan butiran penting dan material terutamanya tentang faktor masa yang merupakan pembelaan alibi. Setiap daripada mereka memberikan masa yang berbeza tentang masa mereka tiba pada malam tersebut. Adalah juga dipertikaikan bahawa perayu-perayu dan empat yang lain telah ke stor itu pada malam pembunuhan itu. Mereka mendakwa mereka berada di situ sebelum pembunuhan berlaku dan pada masa pembunuhan itu berlaku mereka telahpun pulang ke rumah. Oleh itu persoalan utama adalah tentang masa dan bukan kerana perayu-perayu tidak berada di kawasan stor itu (lihat perenggan 91, 93–94 & 96–98).

(6) Berdasarkan analisis pembelaan dan keterangan secara menyeluruh mahkamah mendapati bahawa pembelaan tidak menunjukkan keraguan munasabah ke atas kes pendakwaan. Pendakwaan telah membuktikan kesnya melampaui keraguan munasabah (lihat perenggan 109).]

Notes

For cases on quality of identification evidence, see 7(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2111–2117.

Cases referred to

(1)Namasiyiam (2)Rajindran (3)Goh Chin Peng, and (4)Ng Ah Kiat v PP [1987] 2 MLJ 336, SC (refd)

Ahmad Najib bin Aris v PP [2009] 2 MLJ 613, FC (refd)

Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232, FC (refd)

Dorai Pandian a/l Munian & Anor v PP [2009] 4 MLJ 525, CA (refd)

Hamidon bin Mat Yatim v PP [1995] MLJU 112; [1995] 3 CLJ 724, HC (refd)
Hanafi Bin Mat Hassan v PP [2006] 4 MLJ 134, CA (refd)
Heng Aik Ren Thomas v PP [1998] 3 SLR(R) 142, CA (folld)
KS Roberts v PP [1970] 2 MLJ 137, HC (consd)
Mutachi Stephen v Uganda [2003] UGCA 9, CA (refd)
PP v Khong Soh [1966] 2 MLJ 137 (refd)
PP v Hanif Basree bin Abdul Rahman [2007] 2 MLJ 320, CA (refd)
PP v Shafarin bin Zainal Abidin & Anor [2007] 7 MLJ 474, HC (refd)
R v Hlongwane 1959 (3) SA 337 (refd)
R v Letourneau [1994] BCJ No 265, CA (refd)
R v Lizotte 1950 CanLll 48 (SCC); [1951] SCR 115, SC (refd)
R v Ryan [1990] Crim LR 50, CA (refd)
R v Turnbull [1976] 3 All ER 549, CA (refd)
Regina v Youssef (1990) 50 A Crim R1 (refd)
S v Charzen (2006) SCA 6, SC (refd)
S v Leve (CA&R 163/12) [2013] ZAECGHC 5 (refd)
S v Liebenberg 2005(2) SACR 355 (refd)
Syed Abdullah v PP [1964] 1 MLJ 48 (refd)
Tan Buck Tee v PP [1961] 1 MLJ 176, CA (refd)
Tham Kai Yau & Ors v PP [1977] 1 MLJ 174, FC (refd)
Thirumalai Kumar v PP [1997] 2 SLR(R) 266, HC (refd)
Ye Wei Gen v PP [1999] 4 SLR 101, HC (refd)
Zulkifli @ Sakun bin Ahmad Endin Chun lwn Pendakwa Raya [2013] 1 MLJ 733, CA (refd)

Legislation referred to

Criminal Procedure Code s 402A
Penal Code ss 34, 302

Appeal from: Criminal Trial No S-05–57 of 2007 (Court of Appeal, Kota Kinabalu)

Ram Singh (Ram Singh & Co) for the first appellant.
Yunof Maringking (Maringking & Co) for the second appellant.
Chau Chin Tang (Noriah Nahalan with him) (Chau & Thien) for the third appellant.
Awang Armadajaya bin Awang Mahmud (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.

Richard Malanjum CJ (Sabah and Sarawak) (delivering judgment of the court):

INTRODUCTION

[1] The charge against the appellants reads:

That you all, on the 26th day of May, 2001 at about 2.00 a.m. at a Seven Eleven Shop, Donggongon Town, in the District of Penampang, in the State of Sabah, in furtherance of common intention did commit murder by causing the death of one WELFRED BIN THOMAS (M) 23 years, Dusun and that you all have thereby committed an offence punishable under Section 302 of the Penal Code (F.M.S. Cap 45) read together with section 34 of the same Code.

[2] The appellants are dissatisfied with the decision of the Court of Appeal setting aside their acquittals by the learned High Court judge ('learned trial judge') and convicting them of the offence as charged and sentencing them to death. They are appealing to this court on several grounds. We heard the arguments. We took time to consider all the issues raised by both sides. We have now come to our decision. This is therefore the judgment of the court.

BRIEF FACTUAL BACKGROUND

[3] It was the testimony of PW2 ('Robert Majantim') that in the early morning of 26 May 2001 he went to the 7-Eleven store ('the store') at Donggongon Town, Penampang. On arrival, he saw the cash register wide open and blood on the floor. He then saw PW1 ('Osmund David') lying on the floor near the door to the storeroom of the store covered with blood but still alive. He asked to be sent to hospital. He was clutching the telephone of the store on the desk in the storeroom. He saw another person lying inside the storeroom who was also covered with blood and motionless.

[4] As the police station was nearby PW2 said that he asked his wife to call the police. Unfortunately she failed to contact the police station. Meanwhile PW2 saw a white vehicle pickup passing by. He stopped it and asked the driver to inform the police.

[5] Soon after the police came to the store. PW1 (Osmund David) was taken to hospital together with the other person in the storeroom.

[6] A postmortem was carried out on 28 May 2001 at the Queen Elizabeth Hospital on the cause of death of the person PW2 saw in the storeroom. In his report the pathologist concluded that the death of the deceased, Welfred bin Thomas (M) ('the deceased'), was caused by multiple stab wounds (12 stabs in total) over the neck and upper back.

[7] The star witness called by the prosecution was PW1. He had survived in the attack. It was his evidence that he had a look at the appellants for at least five minutes when they came to the store. He also identified them during the identification parade ('IP') conducted by the police about a month after the incident.

[8] Besides the testimony of PW1 linking the appellants to the murder, there was no other eyewitness who saw the commission of the crime. The results in the forensic investigation were also not much of help to the prosecution.

[9] The blood samples taken from the blood trail that ran from the store to the outside transformer station nearby were tainted and thus not suitable for analysis. The same went with the cigarettes buds collected at the vicinity. An examination of the van allegedly used and searches for blood stained clothes of the appellants proved futile as well. No murder weapon was recovered.

[10] At the end of the prosecution's case, the learned trial judge, after giving the evidence adduced the maximum evaluation, found there was a case to answer and called for the defence of the appellants.

[11] The main defence of the first and second appellants was alibi. But the notice of alibi given by the second appellant did not comply with the requirements under s 402A of the Criminal Procedure Code ('CPC'). The third appellant did not give the necessary notice of alibi. Each of them gave evidence on oath. The defence also called DW2 ('Zainah bt Akim') and DW3 ('Priscilla bt Jarawerd') as their witnesses.

[12] After hearing the defence the learned trial judge discharged and acquitted all the appellants.

[13] Basically his reasons were, inter alia:

(a) that the defence of alibi was established through DW2 and the court accepted it. There was no evidence adduced to indicate how the appellants went back to the place of murder after they went home;

(b) that there was no evidence to incriminate the appellants to the murder. Even the forensic evidence adduced was of no help. None of the appellants suffered cuts or wounds as would seem to have been if based on the blood trail seen from the place of murder to the transformer station;

(c) that there was doubt in the identification of the appellants by PW1. Even the photofits drawn based on the information given by PW1 did not resemble the appearances of the appellants. PW1 described one person he saw that night as having the hair style of the singer 'Sting' yet none of the appellants had such hair style at that time; and

(d) that there was no evidence of common intention adduced by the prosecution. It was for the prosecution to prove its case beyond reasonable doubt.

[14] On appeal by the prosecution, the Court of Appeal unanimously reversed the decision of the learned trial judge.

[15] Briefly the reasons given by the Court of Appeal were thus:

(a) that it was not in dispute that the learned trial judge found a prima facie case against the appellants at the end of the prosecution's case; and

(b) that it was against the weight of evidence and thus a misdirection by the learned trial judge when he sustained the defence of alibi of the appellants.

[16] In their petitions of appeal the appellants raised several issues.

[17] For the first appellant, his petition reads (verbatim), inter alia:

(a) The Court of Appeal was wrong and erred in law when they allowed the appeal by the Respondent and/or overturned the decision of the Learned High Court Judge who discharged and acquitted the Appellants under Section 302 Penal Code;

(b) The Court of Appeal was wrong and erred in law and in fact in failing to consider that on the totality of the evidence adduced during the trial, the Learned trial Judge had made the correct findings on the failure to prove common intention, on the failure to take blood sample on the 1st Appellant to link him to the alleged crime and/or the defence of alibi which was supported or corroborated by Prosecution as well as defence witness, which His Lordship thereafter held that the Defence has raised reasonable doubts on the Prosecution's case and thereby acquitting and discharging the 1st Appellant on the charge of murder;

(c) The Court of Appeal was wrong and erred in law and in fact in not accepting the defences of the 1st Appellant along the principles relating to consider all the evidence in its totality at the close of the defence and made a finding to overturn the decision of the High Court Judge who had discharged and acquitted the 1st Appellant under Section 302 Penal Code.

[18] For the second appellant, his petition contained, (verbatim), inter alia:

(a) The learned Court of Appeal Judges in allowing the Pendakwa Raya appeal and/or by setting aside the learned trial Judge's order of acquittal and discharge of the 2nd Appellant on the charge of murder failed to appreciate:-

(i) that the ingredients of murder, i.e mens rea and actus rea was not proven and/or the accused had raised reasonable doubt on the prosecutor's case at the conclusion of the whole trial.

(ii) There was no cogent evidence at all that the 2nd Appellant and the

other Appellants intended to murder the deceased and the learned trial Judge made a finding of facts that the Police had acted on the 2nd Appellant's notice of alibi;

(b) The learned Court of Appeal Judges did not consider properly or at all in totality the evidence adduced during the prosecution stage and the defence stage which wholly supports the 2nd Appellant's defence;

(c) The learned Court of Appeal Judges erred in law by concerning themselves only on the issue of alibi whereas the defence of the Appellants are not restricted to the issue of alibi only and furthermore, the Appellants evidence was positively supported by the testimonies of the prosecution witnesses;

(d) The learned Court of Appeal Judges failed to appreciate fully or at all that the circumstantial evidence relied upon by the prosecution which when considered properly with the other facts and evidence did not have the cumulative effect of bringing home the reasonable and irresistible inference that the 2nd Appellant had committed and/or was involved in the offence which he was charged;

(e) The learned Court of Appeal Judges ought not to have disturbed the order of the learned trial Judge who had assessed the evidence in totality at the conclusion of the trial and had given benefit of the doubt to the 2nd Appellant which he was entitled to in law based on his finding of fact thereof;

(f) The learned Court of Appeal Judges did not view the whole of the evidence objectively and from all angles especially the demeanors of the prosecution witnesses at the trial which had resulted in the 2nd Appellant's acquittal by the learned trial Judge based on the totality of the evidence given during the prosecution and defence's stage.

[19] For the third appellant, his petition stated these (verbatim), inter alia:

(a) The Court of Appeal has failed to recognize that even though a prima ease has been established at the end of the prosecution case the trial judge is still duty bound to comply with section 182A of the Criminal Procedure Code to re-evaluate the prosecution case and also to evaluate whether at the end of the defence case, the prosecution has proved its case beyond reasonable doubt or the explanation of the defence has cast doubt on the prosecution case.

(b) The Court of Appeal erred in failing to appreciate the defence of the 3rd Appellant is not one of alibi.

(c) The Court of Appeal erred in finding the 3rd Appellant guilty of murder when the photo fit [EX. P47 (a)-(c)] is totally different from the physical identity of the 3rd Appellant on the night in question.

(d) The Court of Appeal misdirected itself in failing to discharge its duty to consider a very strong and forceful submission regarding the complete

A difference of the photo fit and the physical identity of the 3rd Appellant despite the claim of PW1 that he had a good five minutes look at the Appellants.

(e) The Court of Appeal misdirected itself when they failed to give reasons as to why the trial judge had misdirected himself (Rekod Rayuan Tambahan, page 2, para 3).

B

[20] However, before us the focus of the arguments were these:

C (a) the prosecution failed to prove its case. In it the issue of identification was raised;

(b) the defence of alibi;

(c) the absence of forensic evidence linking any of the appellants to the D crime;

(d) the failure to prove common intention; and

(e) the tainted evidence, as it was alleged that some witnesses were coerced to implicate the appellants.

E

[21] Accordingly, we will proceed to consider each of the points relied upon during the arguments before us. We will not address them in the order as listed above as some are overlapping. And we will of course give our consideration of the other issues raised in the petitions of appeal.

F

HAD THE PROSECUTION PROVED ITS CASE?

[22] It is trite that being an appellate court it is our task in this case to review G and consider the decision of the courts below. We need to determine whether on the evidence adduced the defence was rightly called. If so, whether the defence had raised a reasonable doubt in the prosecution's case. And even if it did not it is still essential that to sustain the convictions it must be determined whether the prosecution had proved its case beyond reasonable doubt.

H

[23] In his judgment, the learned trial judge correctly listed the elements required to be proved by the prosecution in order to establish a prima facie case. He said this:

I In order to establish a prima facie case in this murder trial, it is incumbent upon the prosecution to prove;-

(a) the death of the deceased, Welfred bin Thomas occurred on 26th day of May, 2001 at about 2am at 7Eleven Shop Donggongon Town, in the District of Penampang, Sabah;

(b) the death of Welfred bin Thomas was caused by injury or injuries inflicted on the deceased;

(c) the accused had caused the injury or injuries which resulted in the deceased's death; and

(d) the act of causing the death was committed with the mens rea under s 300(a), (b), (c) or (d) in furtherance of common intention under s 34 of the Penal Code.

[24] In respect of elements (a)–(b), the learned trial judge rightly said this:

> Elements (a) and (b) above do not appear to have been disputed. According to the post mortem report prepared by Dr Philip Jayasuriya, the deceased Welfred bin Thomas was brought in dead and his body was identified by the deceased's mother, Nipe @ Dolma bt Yadin (PW5). The death of the deceased was caused by multiple stab wounds as stated in the post-mortem report at exh P55.

[25] As for element (c), the learned trial judge summarised and considered the issues raised before him including the issue of identification of the appellants and thus correctly made his finding:

> In relation to the third element, the prosecution relied solely on the evidence of PW1 Osmund David who positively identified the three accused persons at the identification parades conducted on 24 June 2001 at a police station and again during the trial.
>
> Learned counsel for the accused persons however argued that the evidentiary value of the evidence generated by the identification parade is merely for corroborative purposes. It was further submitted that the substantive piece of evidence is identification in court but cautioned that such identification loses its value where there is evidence to show that the identification parade was conducted irregularly which would be unfair and prejudicial to the accused persons.
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> The defence however submitted that despite the positive identification of the three accused persons at an identification parade on 24 June 2001 by PW1 and again he successfully identified them in court, both identifications were of no evidentiary value and unsafe to be acted upon. Learned counsel therefore argued that there was no case to answer.
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> Notwithstanding the arguments ably put forward by both counsel for the defence there was the testimony of PW1 that he saw the three accused persons when they approached him at the cash register. PW1 alleged that he came face to face with the three accused persons for 'five minutes' when they wanted to get the money found at the cash register. At that time, PW1 was stationed at the cash register. PW1 said he saw their faces.
>
> I cannot brush aside and ignore the glaring testimony of PW1 who said he saw the faces of the three accused persons for five minutes in the 7 Eleven store at Donggongon on 26 May 2001 at 2am. This was a positive identification of the accused persons.

A

> Applying the guidelines in *Looi Kow Chai v Public Prosecutor* [2003] 2 AMR 89; [2003] 1 CLJ 734 (CA) on to the facts of the instant case as well as what I have discussed earlier and after undertaking maximum evaluation, I found prima facie case has been established against the three accused persons and they were therefore asked to enter their defence …

B

[26] Now, element (d) deals with mens rea. It is settled law that for the offence of murder the mens rea element can be imputed from the injuries inflicted upon a deceased.

C

[27] In *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174 the then Federal Court said this at pp 176–177:

> The deliberate use by some men of dangerous weapons at another leads to the irresistible inference that their intention is to cause death. This inference should
D therefore make it a simple matter to come to a decision as to intention, in any case, such as the present, where the weapons used by the appellants were deadly weapons and where the person killed was struck more than one blow.
>
> …
>
> In the present appeal we think that in view of the nature of the injuries sustained by
E the deceased and the time and place of the incident, there was evidence of an intention on the part of the appellants to cause bodily injury to the deceased.

[28] And in *Tan Buck Tee v Public Prosecutor* [1961] 1 MLJ 176 Thomson CJ
F at p 179 also said this:

> There was the body with five appalling wounds on it, wounds penetrating to the heart and liver, which must have been caused by violent blows with a heavy sharp instrument like an axe. In the absence of anything else, whoever inflicted those blows must have intended to kill the person on whom they were inflicted.

G

[29] Accordingly, in the present case the learned trial judge did not doubt the competency of the pathologist who conducted the post-mortem on the body of the deceased and prepared the report tendered as exh P55. In the post-mortem
H report, the cause of death of the deceased was due to 'Multiple Stab Wounds'. In fact there were 12 stabs inflicted upon the deceased. Plainly therefore, the presence of mens rea for the offence of murder can plainly be inferred in this case.

I **[30]** On the issue of s 34 the learned trial judge made a short reference to it when concluding his judgment. He said this:

> The prosecution failed to prove common intention under s 34 of the Penal Code. 'Under the provisions of s 34 the essence of the liability is to be found in the existence of a common intention animating (sic) the accused leading to the doing of

a criminal act in furtherance of such intention' (see *Sabarudin bin Non & Ors v Public Prosecutor* [2005] 4 MLJ 37 per Gopal Sri Ram JCA.

[31] Unfortunately the learned trial judge did not consider the issue before calling for the defence. Despite such oversight, we do not think we are prevented from considering the issue based on the evidence adduced.

[32] It is settled law that under s 34 when a criminal act is done by several persons, in furtherance of the common intention of all, each of such person is liable for that act in the manner as if it were done by him alone. In other words if two or more persons intentionally do a thing jointly it is just the same as if each hand has done it individually. There is no requirement of proof that any particular accused was responsible for the commission of the offence.

[33] In *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232 Hashim Yeop A Sani J (as he then was) at p 268 said this:

> Thus it is clear that the leading feature of s 34 of the Penal Code is the element of participation in action. Two preliminary elements are in fact necessary to fulfill the requirements of s 34. First, there must be evidence (direct or by inference) the accused was present at the scene of the crime. Secondly, there must be evidence to show that there was prior concert or prearranged plan involving the accused. This is logical because how can there be participation without physical presence? Even passive participation may require physical presence.

[34] In the present case there was the evidence of PW1 who testified that he saw the appellants entering the store together. Subsequently, the first appellant chased and attacked the deceased while the second and third appellants attacked him. Obviously they went into the store with common intention to commit an offence that led to the murder of the deceased. As they were together at the time of the commission of the murder they were all liable for the offence regardless which of them did the attack that led to the death of the deceased.

[35] The learned trial judge did not indicate his expectation from the prosecution in order to satisfy the requirement of s 34. But it should be borne in mind that '… Direct intention of a prior plan to commit an offence is not necessary in every case because common intention may develop on the spot and without any long interval of time between it and the doing of the act commonly intended. In such a case, common intention may be inferred from the facts and circumstances of the case and the conduct of the accused' per Syed Agil Barakbah SCJ at p 344 in the case of *(1)Namasiyiam (2)Rajindran (3)Goh Chin Peng, and (4)Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336.

[36] Hence, on the facts and evidence adduced in this case we are satisfied that had the learned trial judge considered the evidence on this issue at the end of the case for the prosecution and upon giving them the maximum evaluation he would have found that the ingredients of s 34 had been duly established and proved.

[37] Accordingly we are satisfied that the defence was rightly called by the learned trial judge at the end of the prosecution's case.

THE DEFENCE

[38] We note that when assessing the defence the learned trial judge surprisingly revisited his earlier findings upon which he called for the defence. Such approach is quite contrary to the principle of maximum evaluation of the evidence adduced at the close of the prosecution's case. Indeed in his judgment the learned trial judge made it very clear that he had conducted a maximum evaluation of the evidence adduced by the prosecution before calling for the defence.

[39] In *Public Prosecutor v Khong Soh* [1966] 2 MLJ 137 MacIntyre J said this at p 139:

> Having held that a prima facie case had been made out against the respondent, the learned president should have given his reasons for holding why the respondent's evidence had created a reasonable doubt in his mind.

[40] Thus, in the present case the learned trial judge, having given the evidence before him the maximum evaluation before calling for the defence, should have therefore focused on whether the defence had cast a reasonable doubt in the prosecution's case and even if it did not, whether as a whole the prosecution had proved its case beyond reasonable doubt before finding the appellants innocent or guilty for the offence as charged.

[41] In the instant case the first and second appellants relied on the defence of alibi while the third appellant denied committing the offence as charged and argued that the prosecution had failed to establish the identity of any of the appellants. In fact in their petitions of appeal and in the submissions of their learned counsel before us, the same issues were canvassed.

[42] Accordingly in considering their appeals before us we will address the two issues, namely:

(a) identification; and

(b) alibi.

Identification of the appellants

[43] The identification of the appellants had been duly considered by the learned trial judge in his deliberation before calling for the defence. He made his factual finding. And unless at the defence stage there was evidence adduced which cast a reasonable doubt in the prosecution's case or that the appellants could show from the evidence adduced by the defence that the finding on identification was flawed, such finding should not be simply overturned by an appellate court.

[44] In this present case as indicated above the learned trial judge accepted that the appellants were positively identified by PW1. He said this:

> I cannot brush aside and ignore the glaring testimony of PW1 who said he saw the faces of the three accused persons for five minutes in the 7Eleven store at Donggongon on 26 May 2001 at 2am. This was a *positive identification* of the accused persons. (Emphasis added.)

[45] But despite his factual finding of positive identification of the appellants by PW1, the learned trial judge subsequently reversed himself at the end of the whole case. And he did it even though the defence had not adduced any evidence to rebut the positive finding on their identification.

[46] Upon our review of the evidence and the relevant legal principles we are of the view that the learned trial judge erred in reversing his initial finding on the identification of the appellants by PW1.

[47] To begin it is in the forefront of our minds the *Turnbull* guidelines (*R v Turnbull* [1976] 3 All ER 549) as succinctly summarised in the case of *Heng Aik Ren Thomas v Public Prosecutor* [1998] 3 SLR(R) 142. Delivering judgment for the Singapore Court of Appeal M Karthigesu JA said this at paras 33–35 of the judgment:

> Although the *Turnbull* guidelines were drafted to assist a trial judge in correctly directing the jury, the principles which were enunciated in it are of equal relevance to our criminal trial system. In adapting the *Turnbull* guidelines for our local system, we have reworked the *Turnbull* guidelines into the following three-step test. The first question which a judge should ask when encountering a criminal case where there is identification evidence, is *whether the case against the accused depends wholly or substantially on the correctness of the identification evidence which is alleged by the defence to be mistaken.*
>
> *If so,* the second question should be this. *Is the identification evidence of good quality, taking into account the circumstances in which the identification by the witness was made?* A non-exhaustive list of factors which could be considered include the length of time that the witness observed the accused, the distance at which the observation

A was made, the presence of obstructions in the way of the observation, the number of times the witness had seen the accused, the frequency with which the witness saw the accused, the presence of any special reasons for the witness to remember the accused, the length of time which had elapsed between the original observation and the subsequent identification to the police and the presence of material discrepancies between the description of the accused as given by the witness and the actual appearance of the accused. In considering the circumstances in which the identification was made, the judge should take note of any specific weaknesses in the identification evidence. If after evaluation of the identification evidence, the judge is satisfied that the quality of the identification is good, he may then go on to safely assess the value of the identification evidence.

Where the quality of the identification evidence is poor, the judge should go on to ask the third question. *Is there in any other evidence which goes to support the correctness of the identification.* If the judge is unable to find other supporting evidence for the identification evidence, he should then be mindful that a conviction which relies on such poor identification evidence would be unsafe. The supporting evidence need not be corroboration evidence of the kind required in *R v Baskerville* [1916] 2 KB 658. *What the supporting evidence has to be is evidence that makes the judge sure that there was no mistake in the identification.* (Emphasis added.)

We agree with the summary of the guidelines.

(See also *Zulkifli @ Sakun bin Ahmad Endin Chun lwn Pendakwa Raya* [2013] 1 MLJ 733; *Dorai Pandian a/l Munian & Anor v Public Prosecutor* [2009] 4 MLJ 525).

[48] No doubt the learned trial judge did not make reference to the *Turnbull* guidelines in coming to his initial finding. But we find that based on the notes of proceeding it is clear that in effect the elements of the guidelines were taken into account. As such his failure to make an express reference to the guidelines has not prejudiced the defence.

[49] It should be noted that at the end of the case for the prosecution the learned trial judge ruled that the appellants had been positively identified by PW1. He must have been satisfied with the accuracy and good quality of the identification. He relied on the fact that PW1 had a good five minutes look at the faces of the appellants that early morning. PW1 also testified that he saw the first appellant chasing the deceased into the storeroom and after coming out from the storeroom the first appellant went on to attack him.

[50] The other contributing factors to the good quality of the identification of the appellants are these:

(a) that those who entered the store that early morning did not wear masks;

(b) that the lighting in the store at that time was bright;

(c) that the two persons who pointed *parangs* on the abdomen of PW1 must have been very near him. PW1 gave the length of the *parangs* to be about a foot (12 inches);

(d) that the view of PW1 on those who entered the store that early morning was not impeded or obstructed;

(e) that it was not a fleeting glance of PW1 (see *Public Prosecutor v Hanif Basree bin Abdul Rahman* [2007] 2 MLJ 320; *Public Prosecutor v Shafarin bin Zainal Abidin & Anor* [2007] 7 MLJ 474; *Hanafi bin Mat Hassan v Public Prosecutor* [2006] 4 MLJ 134);

(f) that in his evidence PW1 was positive that the appellants were the ones who came into the store on that fateful early morning. Under intensive cross-examination PW1 remained steadfast in his answers on his identification of the appellants;

(g) that being the appellate court we do not think we should interfere with the assessment by the learned trial judge of PW1 as a witness on the issue of identification of the appellants or overlooked it (see *Syed Abdullah v Public Prosecutor* [1964] 1 MLJ 48; *Ye Wei Gen v Public Prosecutor* [1999] 4 SLR 101 at pp 107–108 (HC));

(h) that PW1 had no reason or motive to simply implicate the appellants; and

(i) that the IP was also conducted within a month after the incident.

[51] Learned counsel for the appellants strenuously submitted on the discrepancies in the actual appearances of the appellants in court and as described by some of the witnesses called to testify and the photofits composited by PW14 (Marius bin Denis) based on the descriptions given by PW1 on 30 May 2001.

[52] However, it must be appreciated that the main purpose of a photofit is usually to help in the investigation of a crime. It is more to assist in trying to identify potential suspects than for use in a criminal trial. The fact that a photofit is unlike a photograph or video, which is real evidence, means that little weight should be attached to its use as a means of identification evidence in a court of law. It is at best an aid to a criminal investigation. In fact, in this case it was the evidence of investigation officer PW12 ('Chief Inspector Rosdianah bt Rashindin') that the photofits were not relied upon to arrest the appellants. It was based on the information given by PW17 ('Lowryn bin Sabin'), PW18 ('Ng Siau Hui') and DW3 (Priscilla bt Jarawerd).

[53] The accuracy of a photofit depends very much on the ability of the person doing the sketch or composit in relation to what is being described to

him. In fact PW14 testified that he had no formal training in doing photofit and it was the first time he was called to give evidence in court. He went on to say that a photofit should only be taken as a guide. He spent about an hour with PW1 on 30 May 2001. He did not know how to draw. He used a computer to get PW1 to identify the hair, eyes and ears. He said that the process was not accurate.

[54] After he had completed the task with the help of a photographer PW14 gave the photofits to PW12 (Rosdianah bt Rashindin) on 24 June 2001.

[55] It should also be noted that PW1 did not describe any peculiar features of the appellants. According to PW14 the description given to him by PW1 for one of the attackers that early morning was that the person was sporting the hairstyle of the singer 'Sting'.

[56] It was thus submitted that the descriptions of the persons PW1 saw that early morning and the actual appearances of the appellants during the IP and in court did not match.

[57] But as discussed above we do not think much should be made out of the photofit issue. Hairstyles can be changed after a lapse of time (see *R v Ryan* [1990] Crim LR 50). Indeed it can even be used to disguise or mask a person's appearance (see *S v Charzen* (2006) SCA 6 (South Africa Supreme Court)). In the present case there was a lapse of a month before the appellants were apprehended.

[58] Further, much was made out of 'Sting' hairstyle. Yet there was no evidence adduced and no one came to describe the actual look of a 'Sting' hairstyle so as to indicate the stark difference from a person who has a short hair with gel applied. This is the evidence of PW17 (Lowryn bin Sabin) while under cross-examination by learned counsel for the third appellant:

> Q: Rambut Duis Akim pada malam itu, adakah rambutnya seperti rambut penyanyi 'Sting'?
>
> A: Tiada
>
> Q: Apa bentuk rambutnya?
>
> A: Macam biasa sajalah, pendek

[59] Thus, the first appellant did have short hair at that time. Looking at the hair of the photofit it is clear that the prerequisite is short hair. Applied gel and surely the short hair would appear to stick up.

[60] Further, it should also be appreciated that PW1 was made to describe

his assailants on 30 May 2001 (the attack was on 26 May 2001) while he was still recovering from his injuries and according to him he was in pain. Under such circumstances PW1 could not be expected to give the finer details on his assailants.

[61] In fact when he was recalled PW1 readily and freely admitted that the photofit did not really depict of how the first appellant appeared during the IP. Such a stance should be considered in his favour instead of using it to paint him as not a credible witness and thus making the quality of his evidence poor for identification.

[62] As such we think the learned trial judge gave too much weight to the apparent inconsistent descriptions in the photofits of the appellants. He said this:

> Related to the question of identification is the question of the 'photo fit' prepared by the police based on the information given by PW1. None of the photo fits resemble any of the three accused persons. Again doubts as to the identity of the accused persons persists.

[63] With respect, the learned trial judge had the photofit before him at the end of the prosecution's case and before he called for the defence. He did not find such photofit to have contradicted the positive identification of the appellants by PW1.

[64] Thus, to recap, we note that PW1 was positive that those he saw on that early morning of 26 May 2001 were the appellants. He did not waver even under intense cross-examination by defence counsel for the appellants.

[65] And we agree with the initial finding of the learned trial judge that PW1 was a credible witness. If indeed PW1 was purely guessing on the identities of his attackers that early morning he would have also picked up PW17 (Lowryn bin Sabin), PW18 (Ng Siau Hui) during an identification parade conducted by Chief Inspector Mohd Zunaidi Junuh (see exhs P52 and P53). He did not do so. Surely that should enhance his credibility.

[66] It should also be noted that the arrest of the appellants was not the result of pure guesswork. It was the evidence of PW12 that it was PW1 who gave her the lead. He suspected DW3 had something to do with the incident. And unknown to PW1, indeed DW3 and her companion including the appellants came to the vicinity of the store that night.

[67] And although it was submitted before us that PW1 was shown photographs of the appellants during the IP, such assertion was not pursued

during the trial. Learned counsel for the first and second appellants did not cross-examine PW1 on that point. And in his answer to questions from learned counsel for the third appellant, PW1 initially admitted being shown photographs of the appellants in the morning of 24 June 2001, that is, the day the IP was conducted. But during re-examination and upon recall, PW1 corrected himself and said that he was shown only the photofits. And he said that the police did not bring him to see the appellants at any time before or during the IP. In fact PW1 was affirmative in saying that even without seeing the photographs of the appellants he could still identify them.

[68] Accordingly, we are of the view that the learned trial judge erred in relying on the non-resemblance of the photofits to any of the appellants in order to cast doubt in the credibility of PW1 when he said this:

> However, as was readily admitted by PW12, these photo fits do not resemble any of the three accused persons. The fact that PW1 when recalled later to give evidence admitted that the said photo fits do not really resemble the accused persons can only point to one thing: that is the credibility of PW1 as a witness.

THE IDENTIFICATION PARADE

[69] The first IP was conducted in the afternoon of 24 June 2001 starting from 3pm and completed at about 3.35pm under the supervision of PW10 (Chief Inspector Ahmad Zaki Hj Abdullah). At the start of the IP, PW10 briefed PW1 on the procedure. He also explained to the other participants and informed the first appellant of his rights such as his free choice of position in the parade and that he could change his clothes. According to PW10, on the first round, PW1 looked at those paraded and when he came to the first appellant he stopped and looked at the first appellant but did not touch him as required. In our view such precaution taken by PW1 to identify the first appellant should confirm that he did not simply implicate the first appellant and did so only when he was very sure. If he had seen the photograph of appellants as alleged by the defence he could have immediately pointed out the first appellant even during the first round of the IP.

[70] While waiting for the second round of the IP to begin, PW1 was taken back to the CID office accompanied by Cpl Lawrence Leonard. It was during the second round of the IP that PW1 touched the first appellant, thus signifying his confirmation of having identified the first appellant.

[71] And before the third round of the IP began, PW1 was again taken back to the CID office to wait. During the interval, PW10 informed the first appellant that he could change his position in the parade and also his clothes with the other participants of the parade. On the third round of the IP, PW10

said that PW1 again identified the first appellant by touching him. Under cross-examination, PW10 said that PW1 did not see the appellants before the IP. PW10 also said that upon completion of the IP he prepared a report that was admitted as an exhibit without any objection from learned counsel for the appellants.

[72] There was also a suggestion to PW10 that PW7 (Cpl Petros) told PW1 not to be scared but just point the first appellant. PW10 answered that he did not know of such happening. With respect, if indeed learned counsel for the first appellant was serious on the issue PW1 should have been cross-examined about it while he was in the witness box. To put such a question to PW10 was not only unfair to him but also to PW1.

[73] The IP for the second and third appellants was conducted by PW11 (Chief Inspector Rosdi bin Mat Jusoh). It was also held on 24 June 2001 starting from 3.45pm PW11 explained that no IP for all the appellants was done simultaneously because there was only ten participants called for the IP of the first appellant while there were 15 participants for the IP of the second and third appellants.

[74] The IP for the second and third appellants was also on the basis of three rounds. According to PW11 on each round PW1 identified the second and third appellants by pointing and touching them. Before the second round the second and third appellants opted to change their positions in the lineup but not their clothes. PW11 also testified that he did not know whether photographs of the appellants were taken before the IP. And he did not know if PW1 was shown the photographs of the appellants before the IP. Again we would say that learned counsel for the appellants did not put such suggestion to PW1 and PW7 when they were in the witness box. Such failure in our view had made such allegation an afterthought on the part of the defence (see *Hamidon bin Mat Yatim v Public Prosecutor* [1995] MLJU 112; [1995] 3 CLJ 724).

[75] After the IP, a report was prepared by PW11 that was admitted as an exhibit without objection by learned counsel for the second and third appellants.

[76] From the evidence adduced on the conduct of the IP as summarised above, we find that there was therefore no basis and indeed, with respect, was factually and evidentially an error for the learned trial judge at the end of the whole case to come thus to his finding:

> The prosecution's case was a mere concoction built on doubts and conjectures. It started with the testimony of PW1 who claimed that he saw the faces of the three accused persons for five long minutes at the cash register. Yet, he was the same person who could not recognise the three accused persons during the identification parade.

> It is in evidence that he went round them more than thrice and yet he could not identify them. PW1 could only identify them upon being allegedly shown photographs of the three accused persons when he went back from the first few rounds of identification parade into a room at the police station.

[77] In fact, on closer perusal of the evidence of PW7 ('Corporal Petros @ Alam bin Runsab') there was no reference of photographs of the appellants taken by him for 'remembrance'. Indeed he was not even cross-examined on the issue. PW7 only photographed the appellants upon their arrest and that was a procedural requirement. Thus there is also no basis for the learned trial judge to thus remark in his judgment:

> There was suggestion by the defence that identification could only be made when PW1 was shown photographs of the three accused. Testimonies were made in court by the three accused persons that photographs were taken of them were taken twice. One was an official photograph following proper procedure with the registration number while on another occasion it was taken for 'remembrance' said by Cpl Petrus @ Alam bin Runsab (PW7). The said PW7 has not denied having done so.

PW7 could not be expected to deny a matter that he was never confronted in the first place when he was in the witness box.

[78] PW7 and PW1 were also not cross-examined by learned counsel for the appellants on their allegation that PW7 had told PW1 'jangan takut, pegang saja dialah tu' (*Do not be afraid, just touch that's him*) or words to that effect. Again we would say that such failure would strongly indicate that such allegation was just an afterthought.

[79] Thus, having considered the evidence adduced on the identification of the appellants in the light of the *Turnbull* guidelines we are satisfied beyond reasonable doubt that the appellants had been positively identified as the persons involved in the killing of the deceased. In coming to this finding we also bear in mind the dicta of Azlan Shah J (as His Highness then was) in the case of *KS Roberts v Public Prosecutor* [1970] 2 MLJ 137 (HC) at p 138:

> Identification is a fact or circumstance which must be proved against an accused person before it can be relied upon and used against him. A fact or circumstance is held to be proved only when it fulfills the definition of the word 'proved' given in s 3 of the Evidence Ordinance. The evidence of identification is as much subject to this definition as any other kind of evidence but it would appear to me that in assessing the evidence of identification the trial court does not apply the tests provided in this section. It is true that an absolute certainty is not required but the court has to test the evidence with prudence and accept it only when it is so highly probable that its truth can safely be accepted. The test excludes from its orbit blind faith of a true believer, because prudence and credulity do not go together.

(See also *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613).

[80] And it is noteworthy what was said in *Thirumalai Kumar v Public Prosecutor* [1997] 2 SLR(R) 266 by Yong Pung How CJ (S'pore) at para 33:

> The central issue is the extent of prejudice or unfairness caused by any procedural breach or defect. A breach of the procedural requirements in holding an identification parade does not lead automatically to inadmissibility: *R v Jones (Terrence)* [1992] Crim LR 365 and *R v Ryan* [1992] Crim LR 187. Provided the parade is conducted fairly, a failure to comply strictly with instructions in the parade book or other police orders need not be fatal: *R v Mei* (1989) 4 CRNZ 580. On the other hand, where there is evidence of bad faith or a 'deliberate flouting" of procedural requirements rather than mere inefficiency, the identification will probably not be upheld: *R v Finley* [1993] Crim LR 50.

The alibi defence

[81] As indicated above only the first and second appellants relied on alibi as their defence.

[82] However, alibi could not prevail over the positive identification of an accused person especially so in the face of categorical statements coming from credible witnesses who had no ill motives in testifying.

[83] Thus, in *Mutachi Stephen v Uganda* [2003] UGCA 9 the accused said that on the night the offence took place he was already asleep with his wife. However, there was a witness who had positively identified him. As such his alibi collapsed. He has been squarely put at the scene of crime.

[84] Similarly in the present case it was the finding of the learned trial judge, which we agree, that the appellants had been positively identified by PW1. As such, the alibi defence of the first and second appellants collapsed. And since the third appellant did not rely on alibi it was therefore not relevant to him. Yet the learned trial judge appeared to have also allowed the defence of alibi for the third appellant.

[85] Interestingly, we note that all the appellants claimed to be together that night yet the third appellant did not find it necessary to plead alibi as his defence. And it should also be noted that a senior counsel represented him right from the beginning of the case. Basically his defence was one of bare denial. But upon being positively identified his denial collapsed as well.

[86] Accordingly, for the above reasons there is no necessity for us to deal with the alibi defence but merely to consider whether the prosecution had established its case beyond reasonable doubt in order to uphold the convictions of the appellants.

[87] However, for completeness and since the learned trial judge concluded that the 'defence of alibi is accepted by this court' we now examine if such conclusion is supported by the evidence adduced.

[88] The reasons given by the learned trial judge for his conclusion may be summarised as follows:

(a) the evidence of DW2;

(b) 'no evidence adduced by the prosecution to show that the accused persons went to the scene of crime after they returned home at 1 am';

(c) PW18 (Ng Siau Hui) testified that he sent the appellants home 'and after sending them back he went home and the van was at his house as he did not go out again';

(d) not an iota of evidence 'adduced by the prosecution to show how the three accused persons went to' the store. There was no evidence on the transport they used;

(e) the chemist PW8 testified that no trace of blood found inside the van. The van was dry. Since there was blood trail from the door of the store to the electrical transformer at the back it would indicate that the assailants were injured. But none of the appellants suffered injury; and

(f) no traces of blood on the clothes of the appellants.

[89] With respect, we would say that most of the reasons mentioned by the learned trial judge did not take into account certain facts. For instance, in reasons (e) and (f) above the learned trial judge ignored the fact that the appellants were only apprehended about a month after the incident. There would have been more than sufficient time to clean up whatever traces of blood and healing of wounds if any. However, in this case PW12 in answer to a question during her re-examination said that no blood samples were taken from the appellants as PW1 told her that none of them were injured during the incident. Upon their arrest bodily examinations were also conducted. Hence, reason (e) is presumptuous. As such those reasons should not be taken to support the defence of alibi.

[90] As for reasons (b)–(d) they were merely evidence intended to support the defence of alibi. They should not be accepted as the truth without due analysis. They had to be considered in the light of the overall evidence. And although the evidence of PW18 (Ng Siau Hui) was before the learned trial judge at the close of the case for the prosecution he called for the defence after giving the evidence the maximum evaluation. Obviously therefore, he did not believe or gave much weight to the testimony of PW18. To rely on it

subsequently and accepting it as the truth without more in order to support the defence of alibi plainly ignored the other evidence which he accepted when calling for the defence.

[91] Further, in this case it was not in dispute that the appellants with four others went to the vicinity of the store on the night of the murder. All gave the same reason for going there, that is, at the behest of DW3. But they said that they were there earlier and before the alleged time of the murder. By that time they claimed to be already in their respective homes. It was therefore mainly a question of time and not that the appellants were never in the vicinity of the store.

[92] Now, the following legal principles on the defence of alibi are relevant in the present namely:

(a) 'the defense of alibi must preclude the possibility that the accused could have been physically present at the place of the crime or its vicinity at or about the time of its commission' (see *Regina v Youssef* (1990) 50 A Crim R1 at pp 2–3);

(b) the correct 'approach to be adopted in regard to an alibi defence, … *is to consider the alibi in the light of the totality of the evidence and the court's impression of the witnesses. If there are identifying witnesses, the court should be satisfied not only that they are honest, but also that their identification of the accused is reliable. The ultimate test, and there is only one test in a criminal case, is whether the evidence establishes the guilt of the accused beyond reasonable doubt*' (see *S v Leve (CA&R 163/12)* [2013] ZAECGHC 5 (31 January 2013) (South Africa). (Emphasis added.);

(c) as such 'it would be wrong to reason that if the evidence of the state witnesses, considered in isolation, is credible the alibi must therefore be rejected. The correct approach is to consider the alibi in the light of all the evidence in the case and the court's impressions of the witnesses and from that totality to decide whether the alibi might reasonably be true' (see *R v Hlongwane* 1959 (3) SA 337);

(d) '(O)nce the trial court accepted that the alibi evidence could not be rejected as false, it was not entitled to reject it on the basis that the prosecution had placed before it strong evidence linking the appellant to the offences. The acceptance of the prosecution's evidence could not, by itself alone, be a sufficient basis for rejecting the alibi evidence. Something more was required. *The evidence must have been, when considered in its totality, of the nature that proved the alibi evidence to be false*' (see *S v Liebenberg* 2005(2) SACR 355 (SCA). (Emphasis added.);

(e) '(I)t is trite that once an accused person pleads an alibi he does not assume the burden to prove it is true. The onus is on the prosecution to prove by

A evidence the alibi is false and to place the accused squarely at the scene of crime' (see *Mutachi Stephen v Uganda*). The evidence of his alibi need only raise a reasonable doubt that he committed the crime (see *R v Lizotte* 1950 CanLll 48 (SCC); [1951] SCR 115); and

B (f) the alibi of an accused does not have to be corroborated by independent evidence in order to raise a defence (see *R v Letourneau* [1994] BCJ No 265 (QL)(CA), 61).

[93] In coming to his conclusion on the alibi defence the learned trial judge C appeared to have entertained the evidence of DW2 ('Zainah bt Akim') and the evidence on oath of the appellants. He found that such testimonies were corroborated by PW16 ('Paulina bt Moringding'), PW17 (Lowryn bin Sabin), PW18 (Ng Siau Hui) and DW3 (Priscilla bt Jarawerd). The learned trial judge also said that their testimonies were neither challenged nor impeached by the D prosecution.

[94] However, we note that in coming to his finding on those witnesses the learned trial judge did not indicate his reasons for believing their testimonies. E He appeared to have accepted their versions wholesale without any reservation. He did not consider that those witnesses were with the appellants that fateful night while DW2 is the sister of the first appellant.

[95] With respect, the least the learned trial judge could have done was to F juxtapose their testimonies to the overall evidence before him. He should have also stated his reasons for believing their version. Since that was not done we now examine the evidence adduced to determine if indeed the conclusion of the learned trial judge could be upheld.

G **[96]** On close scrutiny of their evidence there were glaring discrepancies. Their accounts contradicted or differed in certain crucial and material particulars especially on the time factor which was the core of the alibi defence.

H **[97]** Each of them gave quite a disparity in time of arrival home that night. For instance:

(a) the first appellant testified that they left Kampong Keramat for the store, that is, the 7 Eleven at Donggongon at about 11pm or coming to 12am. I Then they spent about one hour at Tanjong Aru before going home arriving at about 1am. The second appellant mentioned of the same time of arrival. Both also said that they were sure of the time since the television program was still being transmitted when they arrived;

(b) the third appellant did not know what time they arrived at Donggongon.

He was not wearing a watch. But he disagreed with the first appellant that they returned to Kampong Keramat at about 1am;

(c) PW16 gave the time of returning to Kampong Keramat at about past 12am and then she brought DW3 to visit her nearby friend by the name of David until about 1am. They went home past 1am;

(d) PW17 testified that they left Tanjong Aru around 12am but was not specific of his time of arrival home. Yet PW18 said that they arrived at Kampong Keramat around 12am;

(e) DW3 gave the time of going to Donggongon at about 11pm and spent about one hour at Tanjong Aru. Then they went back to Kampong Keramat arriving there at about 1am; and

(f) DW2 in her evidence said that the first and second appellants arrived home past 12am. She said that if they came back before 12am she would not reprimand them. But that night they came back past 12am. She waited for them until past 12am. Since there was no sign of them she therefore went to bed. Her usual sleeping time was between 10pm and 11pm.

[98] Thus, amongst the abovementioned witnesses there were uncertainty and discrepancy in the time of returning to Kampong Keramat that night. We would say that none of the witnesses appeared to know or told the truth of their arrival time that night. But if indeed the evidence of DW2 were to be relied upon it could be deduced that the first and second appellants must have arrived home much later than 1am.

[99] DW2 said that she waited for the first and second appellants past 12am forgoing her usual sleeping time of between 10pm and 11pm. When they did not arrive she was not happy. She went to bed. Then she heard them arriving and she went to open the door. She said it was late in the night. She said that she was sure it was past 12am. And she was sure that they did not leave home again as they were asleep when she went to the toilet before 4am that morning which according to her was about an hour after their arrival.

[100] Thus, going by the estimated time DW2 gave it was obvious that the first and second appellants must have arrived home much later than the time they gave. As such their denial of being in the vicinity of the store when the murder happened could not be sustained.

[101] Alternatively, since the time of arrival home given by the appellants and their witnesses were conflicting, none could be accepted as correct. And in the face of the positive identification of the appellants by PW1 their alibi defence or denial just could not stand.

[102] Further, having analysed the evidence of DW2 in the light of the other relevant evidence before the court we find that it cannot stand for the following reasons:

(a) DW2 claimed to have opened the door for the first and second appellants. But there was no indication of how she came to know they were at the door. The second appellant said that he did not hear the first appellant knocking the door or the doorbell to alert DW2 of their arrival;

(b) in fact the second appellant did not even know who opened the door let alone being reprimanded by DW2 as she claimed when they arrived home past 12am;

(c) the first appellant was sure of the time as the television transmission was still on but DW2 did not mention about it at all. She said that she went to bed after waiting for them past 12am. Thus, either one or both were not telling the truth;

(d) DW2 in her evidence appeared to have had a very selective memory of events preferring to say she could not remember when it suited her. Further, despite not having looked at a clock, DW2, when it suited her, was adamant on the time. Obviously she was a very biased witness for the appellants;

(e) DW2 was not even certain what time she went to bed on 25 May 2001. She said she waited for the first and second appellants until past 12am before going to sleep. But she also agreed that she went to sleep according to her usual bedtime of between 10pm and 11pm. This was indicative that she was not a truthful witness;

(f) it should also be noted that she was present in court when the first appellant gave his evidence. Yet the learned trial judge found that it was her evidence that established the alibi defence of the appellants. Caution should have been taken before accepting her evidence wholesale; and

(g) DW2 admitted that the first appellant was her responsibility and she would do anything to protect him. Surely such admission should cast serious doubt on her loyalty to the truth.

[103] Accordingly and with due respect the learned trial judge was too lenient when he accepted the testimony of DW2 as having established the alibi defence.

[104] In fact when the evidence of DW2 was cast aside, the appellants' defence was one of mere denial. Juxtaposed that denial to the positive identification by PW1 and it was clear that such denial was bare. It was further undermined by the material discrepancies in the evidence of the appellants and the witnesses who gave evidence in their favour.

[105] For instance, as between the evidence of the first appellant and the second appellant the latter appeared not to know or even remember the critical events related by the first appellant on arriving home. They were together at that time. The second appellant testified that he did not know who opened the door. He did not hear the first appellant knocking the door. Yet DW2 said that she would always open the door for them upon their return from night out which were frequent as they had many friends. This also indicated that the claim by DW2 of opening the door that night could not be believed.

[106] Other obvious contradictions were found in the evidence of DW3. There were as follows:

(a) she said that at Tanjong Aru PW16 was singing while one of the men was playing the guitar. None of those who went to Tanjong Aru ever mentioned such an event;

(b) and while PW16 said that they arrived at Kampong Keramat around 12 am. DW3 said that they arrived at 1am from Tanjong Aru;

(c) DW3 story contradicted PW16 evidence who said that on arrival at Kampong Keramat they went to visit her friend David until past 1am before going back to her house; and

(d) PW16 said that she came to know of the murder from DW3 who told her that the boss of the store called all staff about the murder. This version could not be true as DW3 in her own evidence said that she did not work at the store and she bluffed her way to be sent to Donggongon that night.

[107] Obviously DW3 had a different version of the event that night. Either all were or that DW3 was not telling the truth. Whichever it was the result was the same. It had undermined the appellants denial of involvement in the murder of the deceased.

[108] One other point. The second appellant even went to the extent of alleging that there was a fight between the deceased and PW1 over DW3. But in her evidence DW3 denied being the girlfriend of PW1 and that she did not know the deceased. Again this contradiction merely served to further weaken the defence.

CONCLUSION

[109] Having therefore analysed and considered the defence and the evidence adduced as a whole in this case we find that the defence had not cast a reasonable doubt in the prosecution's case. We find that the prosecution had proved its case beyond reasonable doubt.

[110] We have also considered the other issues raised by the appellants in their petitions of appeal. However, our findings on those issues do not alter our conclusion hereinabove.

[111] These appeals are therefore dismissed and we hereby affirm the convictions and sentences as ordered by the Court of Appeal.

Appeal dismissed.

Reported by Ashok Kumar